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I. INTRODUCTION

Traditional constitutional challenges to the administration of capital punishment in New Jersey have often alleged racial bias in death sentencing.[1] Death penalty laws that discriminate against specific racial or ethnic groups will not survive the scrutiny of the high benchmarks of the Eighth and Fourteenth Amendments to the U.S. Constitution.[2] Supreme Court Justice Stewart, in his concurring opinion in *Furman v. Georgia*, explained that the Eighth Amendment ban on "Cruel or Unusual Punishment" and the Fourteenth Amendment's extension of equal protection to the states involved two protections from discrimination. He explained that the Constitution banned not only all forms of intentional (*de jure*) racial discrimination by the states in the administration of their capital punishment systems but that capital punishment should not *operate* to produce results that are freakish, unpredictable, and arbitrary.[3] Thirty years since *Furman*, in states such as New Jersey, data has revealed a new form of such arbitrariness: substantial geographic disparity in the rates of capital murder prosecution by county prosecutors throughout New Jersey's twenty-one counties.

With the reintroduction of capital punishment in 1982,[4] the New Jersey Supreme Court was statutorily required to conduct appellate review. It is through this mandate that the New Jersey Supreme Court developed more fully the process of conducting

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1 *See* DAVID C. BALDUS, Special Master, Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court (Sept. 24, 1991) [hereinafter BALDUS FINAL REPORT].

2 Furman v. Georgia, 408 U.S. 238, 306-310 (1972) (Douglas, J., concurring) (detailing that laws making blacks, having the equivalent of no more than fifth grade education, eligible for the death penalty, is unconstitutional).

3 *See id.* at 310.

4 *See* The New Jersey Capital Punishment Act of 1982, N.J STAT. ANN. § 2C: 11-3 (West 1995 & Supp. 2003).

individual proportionality review of all death sentences.[5] The Supreme Court of New Jersey has since appointed two special masters to study unsettling evidence of racial discrimination that arose in the course of its proportionality reviews. The most recent study conducted by the Special Master for Proportionality Review, Honorable David S. Baime, J.A.D. ("Special Master"),[6] on behalf of the New Jersey Supreme Court, found that statistical evidence strongly supports the conclusion that "racial discrimination per se does not exist."[7] In fact, the Special Master found that no racial or ethnic disparities exist in the rates of capital prosecution or death sentencing.[8] Nevertheless, some evidence did indicate a correlation between the race of victim and an increased rate in death sentencing. In a most interesting twist, however, the Special Master concluded that this inference was rebutted by another confounding factor: county variance.[9]

Although the New Jersey Supreme Court did not request that Special Master Baime investigate this further and recommended the matter to the Attorney General, the fact remains that county variance may provide a formidable constitutional challenge to the death penalty in New Jersey.[10] Significant geographic variation in the rates at which county prosecutors seek the death penalty[11]creates a strong inference of "arbitrary" and "capricious" ap-

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[5] *See* State v. Cooper, 731 A.2d 1000 (N.J. 1999); State v. Ramseur, 524 A.2d 188, 227-28 (N.J. 1987).

[6] The Honorable David S. Baime, J.A.D., is the presiding judge of the New Jersey Superior Court Appellate Division. He is also noted for hearing the first death penalty case, *State v. Ramseur*, 524 A.2d 188 (N.J. 1987), under the new death penalty statute.

[7] DAVID S. BAIME, SPECIAL MASTER, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000-2001 TERM (June 1, 2001) [hereinafter BAIME III]; *see* PROFESSOR DAVID WEISBURD & PROFESSOR JOSEPH NAUS, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000-2001, TECHNICAL APPENDIX.

[8] BAIME III, *supra* note 7, at 50.

[9] *Id.* at 35-36, 41-50. County variance means geographic variation in the rates at which prosecutors in New Jersey seek the death penalty in proportion to the total number of death-eligible cases that arise within their jurisdictions. Special Master Baime's report showed variation in counties that he classified as urban, less urban, and rural areas. *Id.*

[10] *See* Furman v. Georgia, 408 U.S. 238 (1972) (holding that nondiscriminatory statutes that operate to discriminate against classes of persons implicitly violate the Fourteenth Amendment equal protection guarantee).

[11] BAIME III, *supra* note 7, at 50-51 (concluding that county variability exists in the rates that cases progress to the sentencing proceeding; counties with a large

plication of law.[12] Consider the implications: criminal offenders that commit identical crimes in different parts of the State may or may not face the death penalty based solely on where the crime is prosecuted. The offender is not, however, the only potential victim of this arbitrariness. The citizens of the State of New Jersey enjoy varying degrees of protection by the action or inaction of their county prosecutors. The New Jersey Supreme Court and the Office of the Attorney General must determine the cause(s) of county variance and its effect on constitutional rights.[13]

This Note examines how the exercise of prosecutorial discretion has created an environment of arbitrariness, unpredictability, and inequality that has infected the administration of the death penalty in New Jersey. Part II of this Note discusses the development of the death penalty in New Jersey, focusing on the statutory capital murder provisions as they relate to prosecutorial discretion.[14] It also discusses the existing limitations, or lack thereof, on prosecutorial discretion imposed by the New Jersey Constitution, by statutes, and by the guidelines adopted by county prosecutors to assist them in capital prosecution decisions.[15] Part III of the Note discusses how the evidence of geographic variation in capital prosecution rates, in New Jersey and in other states, may offend federal and state constitutional rights.[16] Since the cause(s) of the county variation and the implications on the denial of constitutional rights are unclear, the State of New Jersey must devote sufficient resources to investigating this phenomenon further. Part IV of this Note advances several proposed modifications to both the capital murder statutes and the county prosecutor guidelines promulgated

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number of African-American victim cases have low rates of cases advancing to a penalty trial while less urban counties with a high concentration of white victim cases have higher rates of capital prosecutions).

12 Gregg v. Georgia, 428 U.S. 153, 227 (1976).

13 *See* BAIME III, *supra* note 7, at 51-52.

14 *See infra* text accompanying notes 18-65; *see generally* The New Jersey Capital Punishment Act of 1982, N.J STAT. ANN. § 2C:11-3 (West 1995 & Supp. 2003).

15 *See* New Jersey County Prosecutor Association, Guidelines for the Designation of Homicide Cases for Capital Prosecution (1989) [hereinafter PROSECUTORS' GUIDELINES] (on file with the New York Law School Journal of Human Rights).

16 *See* BAIME III, *supra* note 7, at 50-52; *infra* text accompanying notes 66-139.

by the Attorney General and County Prosecutor's Association.[17] In addition, studies conducted by other states on prosecutorial discretion and county variance are reviewed.[18] This Note concludes that the existing laws and regulations have failed to channel prosecutorial discretion and have resulted in the arbitrary application of New Jersey's death penalty laws.

II. BACKGROUND

A. *New Jersey's Capital Murder Scheme*

In 1972, a major shift in the jurisprudence of capital punishment occurred when the U.S. Supreme Court struck down racially discriminatory Georgia death penalty laws in *Furman v. Georgia* that violated the Eighth Amendment ban on "Cruel and Unusual Punishment."[19] While the Court refused to invalidate the death penalty per se, it made clear that all death penalty laws that disadvantaged any "unpopular groups" were intolerable under the U.S. Constitution.[20] It would seem quite obvious that the Court required that the highest level of protection be afforded to those who are condemned to die by state law.

This decision prompted lawmakers nationwide to respond to the Court's implicit declaration that each state reconsider its capital punishment laws, with particular consideration given to eradicating racial bias.[21] In *Gregg v. Georgia*, the Court sustained a Georgia death penalty statute establishing a system of "aggravating and mit-

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17 *See infra* text accompanying notes 140-64.

18 *See* Joint Legislative Audit and Review Commission, Virginia General Assembly, Review of Virginia's System of Capital Punishment (Comm'n Draft Dec. 10, 2001) [hereinafter VIRGINIA REVIEW]; DAVID C. BALDUS ET AL., THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973-1999), FINAL REPORT, EXECUTIVE SUMMARY (2001) [hereinafter NEBRASKA STUDY].

19 408 U.S. 238, 238-240 (1972) (abrogating a Georgia statute permitting defendants to be sentenced to death at the unfettered discretion of the judge or jury was a violation of the Eighth Amendment prohibition on cruel and unusual punishment).

20 The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. *Id.* at 256 (Douglas, J., concurring).

21 *See* Gregg v. Georgia.428 U.S. 153, 195 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

igating factors"[22] and of mandatory appellate review of all death sentences by an appellate court.[23] Over the next twenty years, capital statutes were enacted by twenty-five states, all including a system of statutory factors and appellate review.[24] It was widely perceived during this time that the U.S. Supreme Court would not uphold capital punishment statutes that lacked such provisions.[25]

In 1982, New Jersey followed a majority of other states and adopted section 2C:11-3 of the N.J. Code of Criminal Justice, a model of the statute upheld in *Gregg*,[26] which incorporates aggravating and mitigating factors[27] and mandatory appellate review of

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22 *Gregg*, 428 U.S. at 195 (holding that a system designed to balance the existence of aggravating features against the presence of any mitigating circumstances to determine death worthiness is constitutionally permissible). Aggravating factors act as a direct limit on prosecutorial discretion because they limit the types of death-eligible offenses for which the death penalty may be sought. *Id.*

23 *See id.*

24 *See* ALA. CODE §13A-5-53(b)(3) (Michie 1994) (enacted 1981); CONN. GEN. STAT. § 53a-46b (West 2001) (enacted 1980); DEL. CODE ANN. tit. 11 § 4209(g)(2)(a) (2001) (enacted 1977); GA. CODE ANN. § 17-10-35(c)(3) (1997) (enacted 1973); IDAHO CODE 19-2827(c)(3) (Michie 1997) (enacted 1977); KY. REV. STAT. ANN. § 532.075(3)(c) (Michie 1999) (enacted 1976); LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1997) (enacted 1976); MD. ANN. CODE, art. 27, § 414(e)(4) (current version at MD. CODE ANN., CRIM. LAW § 2-401 (2002)) (enacted 1978); MO. ANN. STAT. § 565.035 (West 1999) (enacted 1983); MONT. CODE ANN. § 46-18-310(1)(c) (2001) (enacted 1977); NEB. REV. STAT. § 29-2521.03 (2002) (enacted 1978); NEV. REV. STAT. § 177.055(2)(d) (2001) (enacted 1977); N.M. STAT. ANN. § 31-20A-4(c)(4) (Michie 2000) (enacted 1979); N.C. GEN. STAT. § 15A-2000(d)(2) (2001) (enacted 1977); OHIO REV. CODE ANN. § 2929.05(A) (Anderson 2002) (enacted 1981); OKLA. STAT. ANN. tit. 21, § 701.13(C)(3) (current version at tit. 21, § 701.13 (West 2002)) (enacted 1976); S.D. CODIFIED LAWS § 23A-27A-12(3) (Michie 1998) (enacted 1979); TENN. CODE ANN. § 39-13-206(c)(1)(D) (1997) (enacted 1977); VA. CODE ANN. § 17.1-313(A) (Michie 1999) (enacted 1977); WASH. REV. CODE ANN. § 10.95.130(2)(b) (West 2002) (enacted 1981); WYO. STAT. ANN. § 6-2-103(d)(iii) (enacted 1982) (current version at § 6-2-103 (Michie 2001)).

25 *See* State v. Loftin, 724 A.2d 129, 139 (N.J. 1999) (citing Senate Judiciary Committee, Statement to Senate Bill No. 950 (L. 1985, c. 178)); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The Appearance of Justice,"* 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996).

26 *See* The New Jersey Capital Punishment Act of 1982, N.J STAT. ANN. § 2C:11-3 (West 1995 & Supp. 2003).

27 *See* N.J. STAT. ANN. § 2C:11-3(c)(4)(a)-(*l*) (West 1995 & Supp. 2003) (listing the statutory aggravating factors that may be found by the jury or by the court); § 2C:11-3(c)(5)(a)-(h) (listing the statutory mitigating factors that the defendant may introduce evidence of, to the jury or court).

all death sentences by the New Jersey Supreme Court.[28] Section 2C:11-3 established a bifurcated trial or two-part capital murder trial, notwithstanding the requirement that a county prosecutor seek a criminal indictment for capital murder if he chooses to seek the death penalty. First, the State must prove beyond a reasonable doubt that the defendant "purposefully" or "knowingly" "caused death or serious bodily injury resulting in death"[29] or that the defendant committed the murder in the course of and in furtherance to the commission of one of the predicated felonies.[30] So, a person who purchased a gun, went to the victim's home intending to shoot him, and does shoot and kill him, would most likely be found guilty of the pre-meditation requirements of section 2C:11-3. Second, the State must also prove beyond a reasonable doubt that the defendant committed the murder by his or her "own conduct."[31] The "own conduct" requirement for imposition of the death penalty is not an element of the offense but rather a triggering mechanism that qualifies the case for the sentencing or death penalty phase of a capital trial.[32]

Following a verdict of guilt for purposeful or knowing murder by own conduct, the case then proceeds to a separate sentencing

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[28] Every judgment of conviction which result in a sentence of death . . . shall be appealed, pursuant the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. § 2C:11-3(e).

[29] *See* § 2C:11-3(a)(1) ("Except as provided . . . criminal homicide constitutes murder when [t]he actor purposefully causes death or serious bodily injury resulting in death. . . . ") (alteration added); § 2C:11-3(a)(2) ("Except as provided . . . criminal homicide constitutes murder when [t]he actor knowingly causes death or serious bodily injury resulting in death. . . . ") (alteration added).

[30] "Except as provided . . . [i]t is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002,c. 26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants" § 2C:11-3(a)(3) (alteration added).

[31] *See* § 2C:11-3(c) ("Any person convicted of murder under subsection (a)(1) or (2) who committed the homicidal act by his own conduct . . . shall be sentenced as provided hereinafter . . . "); State v. Chew, 695 A.2d 1301 (N.J. 1997).

[32] *See* State v. Feaster, 716 A.2d 395, 412-13 (N.J. 1998).

proceeding commonly referred to as the penalty phase.[33] In this second trial, a prosecutor is usually precluded from avoiding or waiving the sentencing proceeding as a matter of law.[34] Although this would appear to be a direct statutory limit on prosecutorial discretion, this purpose is undermined by the fact that county prosecutors are required to file a notice of aggravating factors. In order for the case to proceed in the second phase, a prosecutor must give the defendant notice of which factors he intends to prove. A prosecutor that deliberately or innocently fails to file the statutory notice of aggravating factors can avoid the sentencing proceeding, however, and allow the defendant to make a plea that results in life imprisonment instead of death. It is important to realize that the decision to seek the death penalty is made very early in the case, before the case even goes to trial.[35]

During the sentencing proceeding, the State must prove beyond a reasonable doubt the existence of one or more aggravating factors.[36] These factors are legislative prerogatives as to which types of murders should be eligible for the death penalty. If the jury or the court determines, first, that any aggravating factor(s) exist; second, that the aggravating factor(s) outweigh all of the mitigating factors beyond a reasonable doubt, then the court will sentence the defendant to death.[37] If the jury determines in the sentencing proceeding, however, that the aggravating factors do not outweigh the mitigating factors, or the jury is unable to reach a unanimous verdict, then the defendant is sentenced by the court to a term of life imprisonment during which the defendant will not be eligible for parole.[38]

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33 *See* § 2C:11-3(c)(1) ("The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death pursuant to the provisions of subsection (b) of this section . . . ").

34 *See* § 2C:11-3(d).

35 *See* State v. Matulewicz, 557 A.2d 1001, 1007 (N.J. 1989); State v. Gerald, 549 A.2d 792 (N.J. 1988).

36 At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor . . . § 2C:11-3(2)(a); *see* § 2C:11-3(c)(4)(a)-(*l*) (listing the statutory aggravating factors that may be found by the jury or by the court).

37 *See* § 2C:11-3(b)(4).

38 *See* §§ 2C:11-3(b)(1); § 2C:11-3(c)(3)(b).

B. Limits on Prosecutorial Discretion

The prosecutor enjoys a unique position in the criminal justice system. He is vested with plenary authority to prosecute an offender and unfettered discretion to offer plea-bargain to less included offenses. In the context of the death penalty, however, one could argue that such discretion often undermines the effectiveness of representative government and the integrity of the fundamental liberties guaranteeing individual freedom for all. For this reason, one must understand the limitations (or lack thereof) on prosecutorial discretion. These limitations may be viewed as constitutional limitations, statutory limitations, and supervisory and policy limitations.

The office of the county prosecutor is created and fixed by the New Jersey Constitution, which provides for nomination and appointment of county prosecutors for a fixed term by the Governor with the advice and consent of the Senate.[39] Prosecutors are often considered the "gate-keepers" of the criminal justice system. So long as the prosecutor has probable cause to believe that the defendant committed the crime for which he is accused, the prosecutor may choose to prosecute or not to prosecute.[40] In New Jersey, the Supreme Court has held that the primary duty of a prosecutor is to obtain convictions and to see that justice is done.[41]

Although the government is generally afforded wide discretion over whom to prosecute in our criminal justice system, that power is not without constitutional limits. Even as constitutional officers, prosecutorial discretion cannot exceed constitutional limitations. A

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[39] *See* N.J. CONST. art. VII, § 2, para. 1 ("[P]rosecutor . . . nominated and appointed by the Governor with the advice and consent of the Senate . . . "); State v. Laws, 242 A.2d 333, 342 (N.J. 1968) (citing the broad discretion that prosecutors have in the conscientious discharge of the responsibilities of their office); Morss v. Forbes, 132 A.2d 1 (N.J. 1957) (holding that the jurisdiction of the county prosecutor is largely independent of control by the Attorney General but that the Attorney General may intervene by way of super session or where specifically provided by statute).

[40] *See* McClesky v. Kemp, 481 U.S. 279, 296 (1987); Wayte v. United States, 470 U.S. 598, 607 (1985); United States v. Goodwin, 457 U.S. 368, 380 (1982); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[41] *See* State v. Loftin, 680 A.2d 677 (N.J. 1996); State v. Zola, 548 A.2d 1022 (N.J. 1988).

decision to prosecute may not be based on any impermissible factors such as race, religion, or some other arbitrary reason.[42]

One of the attractive features of the death penalty statutes upheld in *Gregg*, and subsequently adopted by many states, was the system of statutory aggravating factors that classified all death-eligible murders. This directly limits the types of murders for which prosecutors may seek the death penalty.[43] Justice White in *Gregg* explained that such a system would prevent the arbitrary and random application of capital punishment and provide "'a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'"[44]

County prosecutors in New Jersey are subject to the vague supervisory authority of the Attorney General. Under the Criminal Justice Act of 1970 the Attorney General is deemed the "chief law enforcement officer of the State" who may "maintain general supervision over . . . county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws."[45] The breadth of this authority remains uncertain, as the New Jersey Supreme Court continues to maintain that county prosecutors are vested with broad discretionary powers to be exercised in the discharge of their exclusive responsibilities under the law.[46]

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[42] *See Wayte*, 470 U.S. at 608; United States v. Schoolcraft, 879 F.2d 64, 68 (3d Cir. 1989); Gov't of Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986).

[43] *See* § 2C:11-3(c)(2)(a) ("[T]he State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4).") (alteration added); PROSECUTORS' GUIDELINES, *supra* note 15, at 1. "The decision to file a statutory notice of aggravating factors . . . one of the most important charging functions to be performed by a County Prosecutor. It is through this decision-making process that a prosecutor commits the entire resources of the criminal justice system." *Id.* pmbl.

[44] Gregg v. Georgia 428 U.S. 153, 188 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)), *cited with approval in* State v. Chew, 695 A.2d 1301, 1314 (N.J. 1997).

[45] *See* § 52:17B-98, *reprinted in* BAIME III, *supra* note 7, at 51; Wright v. State, 778 A.2d 443 (N.J. 2001) (holding that "prosecutors are agents of the State . . . discharging a State responsibility that the Legislature has delegated to county prosecutors, subject to the Attorney General's right to supersede."); State v. Caliguiri, 705 A.2d 1216 (N.J. Super. Ct. App. Div. 1998), *aff'd and modified*, 726 A.2d 912 (N.J. 1999) (holding that although Attorney General is State's chief law enforcement officer county prosecutors are subject to the law as established by the legislature and interpreted by the Supreme Court).

[46] *See* State v. McCrary, 478 A.2d 339 (N.J. 1984); State v. Laws, 242 A.2d 333 (N.J. 1968); State v. LeVien, 209 A.2d 97 (N.J. 1965); *cf.* State v. Winne, 96

In New Jersey, county prosecutors also adopted a set of guidelines to assist prosecutors in making death penalty decisions, the *Guidelines for the Designation of Homicide Cases for Capital Prosecution* (hereinafter "*Prosecutors' Guidelines*").[47] The *Prosecutors' Guidelines* were adopted by all twenty-one counties in New Jersey[48] in response to a judicial mandate by the New Jersey Supreme Court.[49] These guidelines were created to prevent prosecutors from injecting subjective bias into the system.[50] Although they are not legally binding over the county prosecutors, they were promulgated to make uniform the objectives of each county prosecutor in capital murder cases.[51] The guidelines call for the establishment of a committee in each office of the county prosecutor that will aid the individual prosecutor in his/her decision to seek a capital indictment and ultimately the death penalty.

C. *Systemic Proportionality Review: Confirming the Suspicion?*

The identification of county variance is a by-product of the continuous dedication of the New Jersey judiciary to the task of conducting proportionality review of all death sentences as mandated by section 2C:11-3(5)(e).[52] Individual proportionality review under section 2C:11-3(5)(e) plays a vital role in ensuring that the punishment fits the criminal so as to "ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner."[53] While individual proportionality review, or comparison of individual death sentences to those sentences imposed in similar cases, provides protection for individual defendants from biased sentencing, systemic proportionality review entails the monitoring of the death penalty system in the aggregate case. Through complex

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A.2d 63 (N.J. 1953) (holding that prosecutor has a duty to exercise discretion in good faith).

47 *See* PROSECUTORS' GUIDELINES, *supra* note 15.

48 *See id.*

49 State v. Koedatich, 548 A.2d 939, 950 (N.J. 1988).

50 *See* PROSECUTORS' GUIDELINES, *supra* note 15, at pmbl. ("It is neither desirable nor acceptable to have a capital charging standard dependent on individual attitudes.").

51 *See id.* ("These guidelines are not intended to . . . create any substantive or procedural rights, enforceable at law by any party in any matter, civil or criminal. The guidelines do not place any limitation upon the otherwise lawful prosecutorial prerogatives of the Office of the County Prosecutor.").

52 *See Koedatich*, 548 A.2d at 950.

53 State v. Marshall, 613 A.2d 1059, 1068-70 (N.J. 1992).

statistical comparison cases and the isolation of specific variables such as race of the defendant, race of victim, and location of the crime (thus county of jurisdiction), systemic review permits continuous monitoring for disparities, for inconsistencies, and for impermissible influences.[54] To carry out this monitoring function the court has turned to the advice and recommendations of criminal justice experts and of experts in disciplines other than the law.[55]

The first systemic proportionality review project, conducted by Special Master David Baldus, under the direction of the Administrative Office of the Courts, created a database or "universe" of cases from which to administer the statistical models.[56] Through bivariate analyses and regression analyses, Special Master Baldus noticed that the "data indicate that prosecutorial decisions play a prominent role in determining which death-eligible cases advance to a penalty trial. . . . [T]he exercise of prosecutorial discretion . . . varies from one county to the next."[57] Nonetheless, the New Jersey Supreme Court dismissed Baldus' statistical methodology due to the inadequate number of comparison cases in the "universe" in *State v. Marshall*.[58] Almost ten years later, the Supreme Court again renewed its dedication to developing a more reliable statistical model to measure the existence of racial bias in capital murder sentencing.[59]

On August 2, 2000 the N.J. Supreme Court rendered its decision in *In Re Proportionality Review Project*, approving a new multifaceted statistical methodology to study systemic racial

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54 *See* State v. Ramseur, 524 A.2d 188, 292 (N.J. 1987) (holding that a comparison of like cases was an efficient monitoring mechanism to determine whether impermissible factors affected capital sentencing).

55 *Id.* at 293; *see* State v. Cooper, 731 A.2d 1000, 1007-08 (N.J. 1999).

56 BALDUS FINAL REPORT, *supra* note 1, at 1-6.

57 *Id.* at 22-23.

58 *See* State v. DiFrisco, 662 A.2d 442 (N.J. 1995); State v. Bey, 645 A.2d 685 (N.J. 1994); State v. Martini, 651 A.2d 949 (N.J. 1994); State v. Marshall, 613 A.2d 1059 (N.J. 1992).

59 *See* RICHARD S. COHEN & PROFESSOR JOHN W. TUKEY, REPORT TO THE NEW JERSEY SUPREME COURT: PROPORTIONALITY REVIEW 27 (1995). The New Jersey Supreme Court appointed distinguished Professor Emeritus of Statistics at Princeton University, John W. Tukey, as technical consultant to Special Master and retired Superior Court Judge, Richard S. Cohen to review all data and issue findings on designing a parsimonious regression model to study racial discrimination. DAVID S. BAIME, SPECIAL MASTER, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 10-11 (Dec. 1, 1999).

discrimination or other impermissible factors.[60] Although the primary goals of the study were to determine if ethnic, racial, or gender bias affected the administration of the death penalty in New Jersey, the study yielded unintended results that will be explained further in this Note.[61] Special Master Baime did not study county variance further, nor did he offer any opinion on the existence of this phenomenon.

Almost a year later, Special Master Baime presented his *Report to the New Jersey Supreme Court: Systemic Proportionality Review Project 2000-2001 Term*, which in addition to identifying county variance concluded that racial or ethnic bias did not exist.[62] This report confirms the earlier findings of Special Master Baldus.[63]

County variance is the geographic variation between counties in the rates that county prosecutors seek the death penalty (seek a capital murder indictment) and the rates that convictions for capital murder advance to the penalty trial phase, for all statutory "death-eligible" murders.[64] It is important to remember that Special Master Baime's report revealed that the three urban counties comprising the highest number of death-eligible cases (Camden, Essex, and Union counties)[65] have the lowest rate (21%) of advancements to death penalty trials.[66] The remaining eighteen counties, as a whole, having a significantly lower volume of death-eligible cases, had an average rate of advancement to the penalty trial of 42%.[67] In fact, in only seven out of the twenty-one counties (1/3) the rate of advancement to penalty trial was greater than 50%.[68] Why do

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60 *In re* Proportionality Review Project, 757 A.2d 168 (N.J. 2000) (adopting a system that consisted of three different modes of analyses: (1) bivariate analysis using race as the single independent variable, (2) parsimonious regression studies to measure relationships between the statutory factors and death sentencing, and (3) case sorting techniques to create combinations of factually similar cases to identify the existence of racial discrimination).

61 *See id.* at 169.

62 BAIME III, *supra* note 7, at 51.

63 *See generally* BALDUS FINAL REPORT, *supra* note 1, at 22-23 (finding county variances in death sentencing and penalty trial rates).

64 *See id.*

65 *See* BAIME III, *supra* note 7, at 44; WEISBURD & NAUS, *supra* note 7, tbls.48-51.

66 *See* WEISBURD & NAUS, *supra* note 7, at 54, tbls.48-49 (comparing 445 death penalty cases, Camden County has 51 cases of which 25% advanced to the sentencing proceeding; Essex County has 98 cases of which 19% went to the penalty trial; Union County has 40 cases of which 18% went to penalty trial).

67 *See id.* tbl.50.

68 *See id.* at 53-54, tbl.48.

prosecutors in the three urban counties with the greatest volume of death-eligible cases produce the lowest rates of capital indictments and penalty trials? Why is it that less urban and rural counties, with a smaller volume of death-eligible cases, produce higher rates of capital indictments and penalty trials?[69] Because Special Master Baime's report does not address the causes of this county variation, he offers no explanation and refers the matter to the attention of the Attorney General under his supervisory powers.[70] As noted earlier the Attorney General has general supervisory powers over the county prosecutor.[71]

D. Beyond New Jersey: County Variance as a Nationwide Phenomenon

The problem of county variance has also become noticeable in other jurisdictions across the United States.[72] In Nebraska, actual studies were conducted to determine whether prosecutors, in the exercise of their discretion, treat similarly situated defendants differently on the basis of illegitimate or suspect factors.[73] This study found, in terms of geographic variation, just the opposite. The Nebraska study revealed that prosecutors in the major urban counties apply different standards of willingness to waive the death penalty unilaterally or to offer a plea bargain than do prosecutors elsewhere in the state.[74]

For example, in Nebraska, death-eligible cases in major urban counties are nearly twice as likely to advance to penalty trials as death-eligible cases in greater Nebraska.[75] The uneven application of state law creates an "adverse disparate impact" on racial minorities since almost 90% of the minority defendants charged with capi-

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[69] *See id.* (revealing that in suburban counties such as Mercer, Middlesex, Monmouth, and Morris, the percentages of death penalty cases advancing to sentencing proceedings were, respectively, 48%, 61%, 74%, and 57%).

[70] *See* BAIME III, *supra* note 7, at 51 (commenting on how the data is unremarkable based on the densely populated yet heterogeneous nature of New Jersey).

[71] *See* N.J. STAT. ANN. § 57:17B-98 (West 1995), *reprinted in* BAIME III, *supra* note 7, at 51.

[72] *See* NEBRASKA STUDY, *supra* note 18; VIRGINIA REVIEW, *supra* note 18.

[73] *See* NEBRASKA STUDY, *supra* note 18, at 12.

[74] *See id.* at 18.

[75] *Id.* at 18.

tal murder are prosecuted in major urban counties.[76] The data suggests, however, that despite the racial demographics, there is no clear evidence of an adverse impact against minorities in the imposition of death sentences.[77]

In addition to Nebraska's study, the Virginia General Assembly responded to a general concern about the arbitrary manner in which prosecutors apply the death penalty.[78] The findings of the Virginia study complement those of Special Master Baime's report, namely, that prosecutors in high-density population or urban localities are (200%) less likely to seek the death penalty for a similar death-eligible case than prosecutors in medium or low density populations.[79] The Virginia study, however, went further to seek an explanation for county variance of prosecutorial charging decisions.[80]

The first major finding of the study was that prosecutors were more likely to seek a capital murder indictment when the murder victim was a *female* and the crime is committed in a *non-urban* jurisdiction.[81] The most common reason elucidated by high-density population prosecutors for not seeking a capital prosecution was the "perceived reluctance of juries in high density population jurisdictions to impose death sentences" when a prosecutor has sought an indictment, tried a capital murder case, and received only a life imprisonment in the penalty phase.[82] The second finding was that, in cases where the defendant murders a family member or relative, there is strong tendency for prosecutors to defer to the family's

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76 *Id.* at 19. The effect of the difference in the rates that prosecutors advance cases to penalty trials statewide based on geographic location is that minority defendants face a higher risk that their cases will advance to penalty trial death sentences than do white defendants similarly situated. *Id.*

77 *See id.*

78 *See* VIRGINIA REVIEW, *supra* note 18, at i, ii fig. (showing that out of 215 death-eligible offenses, 170 (79%) resulted in a capital murder indictment, 64 (30%) were prosecuted as capital cases, and 24 (11%) resulted in the death penalty).

79 *See id.* at ix. Of 96 death-eligible cases in high-density population jurisdictions, only 16% were elected for capital prosecution as opposed to the 78 cases in medium density populations where prosecutors sought the death penalty in 45% of the cases. *Id.*

80 *Id.* at vi.

81 *Id.* at 47-48.

82 *Id.* at 50.

wishes regarding the death penalty.[83] The third finding was that the data strongly suggests that the geographic location of the offense has the strongest effect on the likelihood that a person will face capital prosecution; prosecutors in high-density areas were 87% less likely to seek the death penalty in any given case than a prosecutor in low-density localities.[84]

III. COUNTY VARIANCE: A CONTINGENT CONSTITUTIONAL CLAIM?

While the specific causes of county variance remain unclear pending further study, its very existence presents a new and complex issue to the constitutional administration of the death penalty. This issue is whether significant geographic variance in the rates that county prosecutors seek the death penalty at various stages of a death penalty case is in conflict with the individual civil liberties guaranteed by the Fifth,[85] Eighth,[86] and Fourteenth Amendments to the U.S. Constitution.[87] Although traditional empirical challenges to the death penalty have focused mainly on racial bias in death sentencing, the U.S. Supreme Court forewarned in *Furman v. Georgia* that facially non-discriminatory death penalty laws could

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[83] *See* VIRGINIA REVIEW, *supra* note 18, at 66 (noting a 78% lower probability that the local prosecutor would ask for the death penalty than where the victim and the defendant knew each other but were not related).

[84] *See id.*

[85] *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that, although the Fifth Amendment does not contain an equal protection clause, it does contain an equal protection component like the Fourteenth Amendment).

[86] *See* Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("[L]egal systems that permit [the death penalty] to be so wantonly and so freakishly imposed" as "cruel and unusual punishment in the same way that being struck by lightning is cruel and unusual."); Oyler v. Boles, 368 U.S. 448 (1962).

[87] *See Furman,* 408 U.S. at 256-57 (Douglas, J., concurring) (holding that the death penalty inflicted is "unusual" under the Cruel and Unusual Punishment Clause of the Eighth Amendment and Equal Protection Clause of the Fourteenth Amendment if it discriminates against a person by reason of his race, religion, wealth, social position, or class, or *if it is imposed under a procedure* that gives room for play of such prejudices); State v. McCrary, 478 A.2d 339, 350 (N.J. 1977) (holding that the decisions by prosecutor to admit defendant to a pretrial program has separation of powers implications); *see generally* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *id.* amend. XIV, ' 1("[No] State [shall] deprive any person of life, liberty, or property, without due process of law.").

still offend constitutional principles if the laws operated to produce freakish or arbitrary results that caused prejudice.[88]

Since *Furman*, the Court has held that the standard for determining whether there has been an abuse of prosecutorial discretion requires a defendant to prove both that other persons similarly situated were not prosecuted (discriminatory effect) and that the decisions to prosecute were based on impermissible factors such as race, religion, or some other arbitrary reason (discriminatory intent).[89] Discriminatory intent, the Court admitted, would be difficult to identify through empirical analysis since it requires specific and concrete proof.[90]

Since the Court's decision in *Gregg v. Georgia*, a small minority on the U.S. Supreme Court has addressed the inherent flaws of the post-*Gregg* death penalty systems, including the abuses arising from unbridled prosecutorial discretion. U.S. Supreme Court Justices William Brennan and Thurgood Marshall were perhaps the most outspoken critics of the post-*Gregg* death penalty laws. First, the Justices believed that these schemes failed to channel prosecutorial discretion. This discretion had to be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[91] They noted, however, that there are no standards by which prosecutors make decisions and no supervisory authority providing a system of checks and balances.[92] Secondly, the Justices also claimed that the non-waiver of sentencing proceeding provision of section 2C:11-3(d) of the New Jersey Code of Criminal Justice, which was intended to prevent prosecutors from waiving the sentencing proceeding, was easily circumvented by a prosecutor's

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[88] *See Furman,* 408 U.S. at 257 (Douglas, J., concurring) ("Any law which is non-discriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.").

[89] *See* United States v. Armstrong, 517 U.S. 456 (1996); Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington. v. Davis, 426 U.S. 229 (1976); United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991).

[90] McCleskey v. Kemp, 481 U.S. 279, 292-93 (1987) (explaining that discriminatory intent *cannot* be conclusively inferred because aggregate statistic measures of the total sentencing outputs of the death penalty system encapsulate the decision-making of prosecutors, jury panels, or other agencies, which each make their own subjective determinations and that discriminatory effect requires a showing that similarly situated individuals were treated differently).

[91] *See* DeGarmo v. Texas, 474 U.S. 973, 975 (1985) (mem.) (Brennan, J., dissenting).

[92] *Id.* at 975.

acceptance of a plea agreement or by the prosecutor's willful failure to file a notice of statutory factors as required under section 2C:11-3(c).[93]

A. *Constitutional Implications of County Variance in New Jersey*

Until the specific causes of county variance can be isolated and defined, few conclusions may be made about the degree of constitutional tolerance of county variance. This is not to suggest that such disparity in decision-making between county prosecutors should not raise concern. Special Master Baime himself was clearly unwilling to speculate on the implications of his findings.[94]

What could cause county variance? It could be that prosecutors in suburban and rural counties have more resources per capita case than do the urban counties that have a significantly higher volume of death-eligible cases. It may be that prosecutors in these urban counties are guided by extra-legal notions such as their perceptions about jury behavior[95] and the effects of race of the defendant or race of victim on the likelihood of receiving a conviction. County variance may be the result of personal individual beliefs or political pressures.

A determination of the root causes of county variance remains an important task in the years ahead. The N.J. Supreme Court seems ready to pursue the issue and has committed its resources to address the seemingly excessive discretionary powers exercised by the county prosecutor. The Legislature must also reconsider the current system of legislative and judicial checks and balances on county prosecutors.[96]

B. *Failure to Channel Discretion: An Aggravating Reality*

The New Jersey death penalty statute, section 2C:11-3 of the N.J. Code of Criminal Justice, was intended to channel jury and prosecutorial discretion through the creation of specific categories

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[93] *See* Eddmonds v. Illinois, 469 U.S. 894 (1984) (mem.) (Marshall, J., dissenting).

[94] *See* BAIME III, *supra* note 7, at 5 ("It is arguable that the county in which a death-eligible crime takes place should not influence whether a case is capitally prosecuted. We offer no opinion of this subject. . . . ").

[95] *See* BALDUS FINAL REPORT, *supra* note 1, at 21.

[96] *See generally* N.J. STAT. ANN. § 2C:11-3(c)(4)(a)-(*l*) (West 1995 & Supp. 2003); State v. McCrary, 478 A.2d 339, 350 (N.J. 1984); PROSECUTORS' GUIDELINES, *supra* note 15.

of aggravated murder that would be eligible to receive the death penalty.[97] The statutory factors encompass three main aspects of criminal culpability that justify imposing the death penalty: moral blameworthiness, victimization (terror or suffering), and the defendants' character and prior criminal record.[98] Special Master Baldus suggested that the degree of both moral blameworthiness, victimization, and defendants' character and prior record were significant factors in understanding prosecutorial decision-making.[99]

The statutory aggravating factors in section 2C:11-3(c)(4)(a)-(*l*) were adopted with the expectation that prosecutors would execute the law to its fullest extent where the facts and circumstances so warranted. After the adoption of the current death penalty statute, however, the trend between 1982-1989 was a significant decline in the frequency with which death-eligible cases advanced to the penalty trial.[100] Overall, this resulted in a gradual decline in penalty trial death-sentencing rates continuing to the present time.[101] From 1983 to 2001, out of 515 death-eligible cases, only 184 (36%) of the total death-eligible cases advance to a penalty trial.[102] This means that, despite a statutory prohibition against a prosecutor's waiver of the sentencing proceeding after a capital conviction, prosecutors nonetheless eliminate 2/3 of all death-eligible murders through the exercise of their discretion. Of the 184 penalty trials that were conducted, only 56 (11%) resulted in a sentence of death.[103]

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97 *See* § 2C:11-3(b), (c).

98 *See* State v. Ramseur, 524 A.2d 188, 230 (N.J. 1987); BALDUS FINAL REPORT, *supra* note 1, at 72-73 (explaining the relationship of specific aggravating factors to concepts such as moral blameworthiness and victimization).

99 *See* BALDUS FINAL REPORT, *supra* note 1, at 72-73.

100 *See id.* at 19 (reflecting the rates at which death-eligible cases advance to penalty trials); DAVID C. BALDUS, SPECIAL MASTER, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT, INTERIM REPORT TO THE NEW JERSEY SUPREME COURT tbl.3A (May 29, 1990) [hereinafter BALDUS INTERIM REPORT] (showing in column B that the proportion of death-eligible cases advancing to a penalty trial is 60% or 118/198) (on file with the New York Law School Journal of Human Rights).

101 *See* BALDUS FINAL REPORT, *supra* note 1, at 15 (indicating that before 1988, 21% or 29/140, while the overall rate after 1987 was 6% or 5 out of 187 cases).

102 HONORABLE DAVID S. BAIME, REPORT OF THE SPECIAL MASTER ON PROPORTIONALITY REVIEW: *State v. Steven Fortin*, at A-1 (Sept. 18, 2001) [hereinafter FORTIN Proportionality Review].

103 *See id.*

Given the failure of prosecutors to prosecute most death-eligible capital murders, it seems likely that the statutory factors do not adequately define contemporary notions of death worthiness. So, although some types of murders are considered death-eligible by statute, very rarely will murders with certain aggravating factors result in a sentence of death.[104] Only three specific aggravating factors, section 2C:11-3(4)(a) ("defendant had a prior murder conviction") (67% 6/9); section 2C:11-3(4)(d) ("victim was a public servant") (67% 2/3); and section 2C:11-3(4)(c) (depravity of mind) (50% 1/2), result in jury death sentences most of the time.[105]

In a further analysis called "salient factors," relevant non-statutory factors called "aggravating circumstances" were identified.[106] These aggravating circumstances are mainly subcategories of specific aggravating factors under section 2C:11-3(4)(a)-(*l*).[107] Most studies have never focused on prosecutor decision-making and the influence of specific aggravating circumstances on the decisions of prosecutors. Thus, it certainly seems time to expand the salient factor studies to consider the aggravating circumstances which may drive prosecutorial discretion. The danger of such broad discretion is that there have been virtually no limits to what prosecutors may consider in making this decision.[108] The result, as Justice Handler explained, is unprincipled, unguided, and arbitrary.[109]

C. The Ineffectiveness of the Prosecutors' Guidelines

In *State v. Ramseur,* the New Jersey Supreme Court first addressed the inconsistency of prosecutorial charging practices.[110] The

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104 *See* BALDUS INTERIM REPORT, *supra* note 100, at tbl.3A (demonstrating in Column C that the aggravating factors that were less likely to result in death penalty trials were: 4(g) "Arson" (33% 3/6), 4(g) "Burglary" (17% 1/6), 4(c) "Depravity of Mind" (33% 2/6), 4(f) "Escape or detection" (0% 0/2)).

105 *Id.*

106 BALDUS FINAL REPORT, *supra* note 1, at 84.

107 *See id.* (revealing some "aggravating circumstances:" 4(a) (defendant had a prior murder conviction), 4(h) (police officer victim), 4(d) and 4(e) (contract killing), 4(g) (multiple victims, violent sexual assault, highly aggravated residential burglary and robbery).

108 *See id.* at 139-41.

109 *See* State v. Jackson, 607 A.2d 974, 975 (N.J. 1992) (mem.) (Handler, J., dissenting).

110 *See* State v. Ramseur, 524 A.2d 188, 293 (N.J. 1987) (stressing the uniqueness of prosecutorial discretion in determining a defendant's death eligibility and the concerns arising from the lack of consistency or coherence in the exercise of that discretion).

court held that, although it is clearly the domain of the prosecutor to determine whether to seek a capital prosecution, it was deeply concerned about consistency in the exercise of this discretion.[111] In furtherance of its commitment to channel prosecutorial discretion, and achieve more consistent and reliable results, the New Jersey Supreme Court recommended in *Koedatich I* that the State "adopt guidelines for use throughout the state by prosecutors in determining the selection of cases."[112] The County Prosecutor Association and the Attorney General responded by adopting the *Prosecutors' Guidelines.*[113]

These guidelines consist of seemingly general statements about the relevant objectives of a prosecutor during the pre-indictment decision-making process.[114] Moreover, the *Prosecutors' Guidelines* are not legally binding on the prosecutors in the discharge of their official duties.[115] Because these guidelines place no real limitations and provide no substantive standards on which to base decisions, they fail to effectively limit prosecutorial discretion.

The first guideline establishes a committee in each of the twenty-one county prosecutors' offices to assist the prosecutor in his or her individual determinations as to death eligibility.[116] The committee reviews the statutory aggravating and mitigating factors in specific death-eligible cases in order to determine whether a capital prosecution is warranted.[117] The committee ultimately should also assist the decisions of individual prosecutors.[118] These guidelines do not provide detail on how the committee may discharge

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111 *See id.*

112 State v. Koedatich, 548 A.2d 939, 955 (N.J. 1988).

113 *See* PROSECUTORS' GUIDELINES, *supra* note 15.

114 *See generally id.* at 3-5.

115 These guidelines are not intended to, and should not be relied upon to create any substantive procedural rights, enforceable at law by any party in any matter, civil or criminal. These guidelines do not place any limitation upon the otherwise lawful prosecutorial prerogatives of the Office of the County Prosecutor. . . . *See id.* pmbl.

116 *See id.* guideline 1 (requiring that a committee be established within each county prosecutor's office to review each homicide case pursuant to the capital murder statutes).

117 *See id.*

118 *See id.* ("Each county prosecutor shall establish within his office a committee to review every homicide case pursuant to the statute and guidelines, to assist the prosecutor in the prosecutor's determination as to death eligibility.").

their duties as an advisory board, or what function the committee should serve in the overall decision-making process.[119]

Guidelines two through four require that that the prosecutor make determinations based on his or her professional judgment as to whether there is proof beyond a reasonable doubt that the defendant, by his own conduct, actively and directly participated in causing the death of the victim, or procured the commission of the homicide by payment or promise of anything of pecuniary value.[120] Guidelines two[121]and four[122] require that prosecutors be satisfied that there is proof beyond a reasonable doubt of the existence of one or more aggravating factors. Again, the guidelines place no real constraints on prosecutors and fail to describe what criteria or types of evidence should be considered in making particular decisions.[123] Guideline six states that after a prosecutor is satisfied that the State will be able to prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, the case is then designated a "Capital Case."[124]

The integrity of the *Prosecutors' Guidelines* was first challenged in the dissent of Justice Handler of the New Jersey Supreme Court in *State v. Jackson.*[125] In that case, the county prosecutor indicated that he would accept a plea to non-capital murder, which would carry a sentence of thirty years to life imprisonment without the chance of parole.[126] One day later, the prosecutor withdrew his plea offer and proceeded to prosecute the defendant for capital murder.[127] On appeal the defendant challenged the prosecutor's be-

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119 *See* State v. Jackson, 607 A.2d 974, 978 (N.J. 1992) (mem.) (Handler, J., dissenting).

120 *See* PROSECUTORS' GUIDELINES, *supra* note 15, at guidelines 2-4.

121 The prosecutor, in determining whether or not a case is death-eligible, must be satisfied that there is proof beyond a reasonable doubt that the defendant, by his own conduct, actively and directly participated in causing the death of the victim, or procured the commission of the homicide by payment or promise of payment of anything of pecuniary value.

122 *Id.* guideline 3. *Id.* guideline 4 ("The prosecutor must be satisfied that there is proof beyond a reasonable doubt of the existence of at least on statutory aggravating factor.").

123 *See id.*

124 *Id.* guideline 6.

125 *See* 607 A.2d 974 (N.J. 1992) (mem.) (Handler, J., dissenting).

126 *See id.* at 974, 974.

127 *See id.*

havior as an abuse of the system, indicative of the arbitrary and capricious nature of the New Jersey death penalty law.[128]

The behavior of the county prosecutor in *Jackson* illustrates the problems associated with unbridled prosecutorial discretion. First, numerous contacts were made by the county prosecutor to the victim's family to ascertain their feelings on punishing the defendant with death.[129] Justice Handler believed that county guidelines failed to prevent prosecutors from considering irrelevant, improper, and prejudicial evidence. Even more troubling is the fact that the judge candidly urged the prosecutor to make these contacts.[130] In fact, after informing the judge that the prosecutor would not seek the death penalty, the judge expressed his displeasure with the State's opinion and commented, "If any case deserved the death penalty it is this one."[131] While judges generally have the power to accept or deny plea arrangements based on the facts and circumstances of the case,[132] rendering personal opinions or feelings about a particular case may transgress the province of the judiciary.

Based on his discussions with the presiding judge, the prosecutor changed his decision and notified the trial judge and defendant's counsel that the State would seek the death penalty.[133] The prosecutor admitted that he believed not seeking the death penalty in Jackson's case would set a precedent against securing the death penalty in other highly aggravated future cases.[134]

The *Prosecutors' Guidelines* have resulted in a capital-murder regime that is "unprincipled and unguided" in the words of Justice Handler. "Prosecutorial charging practices are so inconsistent and disparate that the end results have become irretrievably arbitrary and capricious."[135] He further characterized the *Prosecutors'*

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128 *See id.* at 975.

129 *See id.* This should not be confused with victim impact evidence that courts will permit the state to introduce during trial.

130 *See id.*

131 *Id.* at 976.

132 The Court in its discretion, may refuse to accept a plea of guilty and shall not accept such a plea without first addressing the defendant personally and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as the results of any threats or any promises or inducements not disclose on the record, and with an understanding of the nature of the charge and the consequences of the plea. N.J. CT. R. 3:9-2; *see* State v. Davis, 561 A.2d 1082 (N.J. 1989).

133 *See Jackson,* 607 A.2d at 976.

134 *See id.*

135 *Id.* at 975.

Guidelines as "vague and unfocused" and that they ultimately failed to perform the function of assisting prosecutors in the process of evaluating the evidence and the factual circumstances in the decision-making process.[136]

IV. PLACING REAL LIMITS ON PROSECUTORIAL DISCRETION

A. Comparative Analysis of Prosecutorial Decision-Making

The existence of county variance may tend to confirm the unsettling truth about the effects of unbridled prosecutorial discretion on the administration of capital punishment in New Jersey.[137] Aside from the obvious inequalities of geographic disparity in rates of prosecution, the current laws allow prosecutors to eliminate over 2/3 of all death-eligible cases without standards, without supervision, and without a system of checks and balances.[138] The time to revisit and reconsider capital punishment in New Jersey has arrived.

The New Jersey Supreme Court and the Attorney General must jointly conduct a comprehensive inquiry into the causes of county variance and its effects of the administration of capital punishment. The Commonwealth of Virginia conducted a study, led by the Joint Legislative Audit and Review Commission (JLARC) that focused on three issues.[139] First, the study sought to explain the variation in decisions by county prosecutors to seek indictments for capital murder for all persons charged with a capital offense.[140] Second, the study sought to determine the factors that influence prosecutors to seek the death penalty in capital cases.[141] Importantly, the study focused on whether prosecutors based their decisions on arbitrary or extra-legal factors such as the defendants' race.[142] Third,

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136 *Id.* at 978.

137 *See generally* BAIME III, *supra* note 7.

138 *See* FORTIN Proportionality Review, *supra* note 102, at A-1. The individual proportionality review pursuant to section 2C:11-3(e) conducted for Steven Fortin's death sentence indicates the current death sentencing and penalty trial rates among N.J. death-eligible cases, 1983-2001. Out of 515 cases the proportion of death-eligible cases that advanced to a penalty trial was 184/515 (36%). *Id.* So, prosecutors eliminate a little less than 2/3 of all death-eligible cases with their discretion, because a case may only advance to a penalty trial if a prosecutor decides pre-indictment to pursue the death penalty.

139 *See* VIRGINIA REVIEW, *supra* note 18, at 28.

140 *See id.*

141 *See id.*

142 *See id.* Examples of extra-legal factors could also be the gender of the victim, the type of community where the crime was committed, socio-economic

the study sought to determine how to distinguish between cases resulting in death sentences from those where a sentence of death was considered but not imposed.[143]

To carry out the study, the JLARC conducted detailed file reviews of all death-eligible cases from 1995 to 1999[144] and mailed surveys to over 121 local prosecutors.[145] The survey responses were then electronically tabulated to assist in the analysis of prosecutorial discretion.[146] The goal of the file reviews was to supply data for case comparisons.[147] Unlike New Jersey, Virginia does not have a centralized database containing detailed information on murder cases which can be used for analysis; instead it used arrest records issued by the Virginia State Police and the Sentencing Commission of the Virginia Supreme Court.[148]

The study characterized localities by population density.[149] A cluster sampling technique was used to select the sample of cases for the study, organizing each locality studied into one of three non-overlapping clusters: high-density population, medium density population, and low-density population.[150] Sample weights were given to each county to account for the higher percentage of cases in the high-density clusters.[151]

Mail surveys of Commonwealth attorneys also supplemented the statistical studies employed by the JLARC. Each of the local

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status of both the defendant and the victim, and the relation of the defendant to the victim.

143 *See id.*

144 *See id.* at 29. This date is significant in Virginia because after 1995 parole for the death penalty was abolished. The study reflects only those death-eligible cases during that period. *Id.*

145 *See id.*

146 *See id.* (indicating that the primary sources used by the JLARC included criminal indictment records, reports on descriptions of crimes, court transcripts, demographic data on the defendants and the victims, autopsy reports, forensic evidence reports, prosecutor witness files, criminal history data on defendants, and pre and post investigative reports compiled by the Department of Corrections).

147 *See id.*

148 *See id.* at 30.

149 *See id.* at 31 tbl.8 (distributing death-eligible cases throughout high, medium, and low-density localities). Note that while only 21% of the counties surveyed were considered high-density population (urban) localities, they account for 45% of the total death-eligible cases during the study period. *Id.* In contrast, medium density localities amounted to 43% of the counties studied but accounted for only 36% of the total cases. *Id.*

150 *See id.* at 32.

151 *See id.* at 34-35.

prosecutors of the State was surveyed regarding the policies and practices associated with the application of death penalty statutes.[152] Prosecutors were questioned about the factors they considered in deciding how to proceed with capital eligible case and what their rationale was for plea agreements in capital murder cases.[153]

In January 2003, Maryland released *An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction* after the study was commissioned by former-Governor Parris N. Glendening.[154] The study concluded that the jurisdiction in which a case is prosecuted is an important factor.[155] The study characterized the variation in the treatment of cases across different jurisdictions as "statistically significant."[156] It also found significant variation in the determinations of prosecutors to file a notification of aggravating factors and the determinations to retain or withdraw the notification.[157] There was no significant variation across legal jurisdictions, however, concerning the advancement of a case to a penalty trial once a conviction for the underlying capital murder was returned.[158]

Like the Virginia study, the Maryland study sought to determine what factors affected prosecutor decisions. The Maryland study concluded that race of the victim greatly affected a prosecutor's decision to file a statutory notice of aggravating factors and the decision to withdraw that notice.[159] The study concluded that African-Americans who kill whites are more likely to receive a statutory notice of aggravating factors, that prosecutors are less likely to retract that notice, and that African-Americans are more likely to be sentenced to death.[160]

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152 *See id.* at 35.

153 *See id.* at 35.

154 *See* PROFESSOR RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION, FINAL REPORT 1-131 (2003) [hereinafter MARYLAND STUDY].

155 *Id.* at 25-26.

156 *Id* at 25.

157 *Id.* at 1-3.

158 *Id.*

159 *See id.* at 1-5.

160 *Id.*

B. Creating Real Limits on Prosecutorial Discretion

Until substantive guidelines are developed which are binding and which may be enforced by a supervisory authority, unbridled discretion will continue. These guidelines must define the criteria relevant to capital decision-making.[161] Perhaps these guidelines might consist of a list of non-statutory and statutory factors, similar to Special Master Baldus' "salient factors," that would enable prosecutors to make better decisions.[162] If the "salient factors" model could be expanded to include such non-statutory factors as educational background, history of drug or alcohol abuse, employment history, or things like remorse for victims' families, capital prosecution outcomes could be monitored more predictably.

These non-statutory factor guidelines could be very useful in distinguishing what types of cases would or would not result in the death penalty. For example, the proportion of death-eligible cases advancing to a penalty trial for a murder of a police officer is 9/10 or 90%.[163] Similarly, the rate of advancement to penalty trials for murders where the defendant had a prior murder conviction is 25/37 or 68%.[164] The non-statutory factors would allow prosecutors to determine why the one case involving a murder of a police officer did not result in a penalty trial. What factors were different in the twelve cases where the defendant had a prior murder conviction but which resulted in avoidance of a penalty trial? Likewise, the rate of advancement for murders involving a grave risk of danger to another person is only 3/45 cases or 7%.[165] What made prosecutors in those three cases decide to advance the case to a penalty trial?

A substantive guideline would be most beneficial in the "mid-range" of cases, where convictions are most unpredictable.[166] It is here that prosecutorial decisions may have the greatest potential to be arbitrary and capricious. Moreover, the presence of aggravating circumstances or varying levels of mitigation make prosecutorial charging decisions a technical, if not scientific, process. For in-

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161 *See* PROSECUTORS' GUIDELINES, *supra* note 15.

162 *See* FORTIN Proportionality Review, *supra* note 102, at A-1.

163 *See id.*

164 *See id.*

165 *See id.*

166 *See id.* The aggravating factors that fall within the category of the moderate range of death-eligible cases include purposeful and knowing murder by the defendant's own conduct involving a sexual assault, a robbery, depravity, burglary, and arson. *Id.*

stance, where robbery is the aggravating factor at issue, there is a 35% death-sentencing rate for robberies committed in residential areas, however, prosecutors are generally more reluctant to prosecute these cases (25% or 14/56 cases).[167] Even though factual and evidentiary circumstances will vary greatly, prosecutor decisions must be studied in greater detail.

In addition to new substantive guidelines, the Office of the Attorney General should review all death-eligible cases for potential abuses of discretion by creating an ad- hoc committee to review all death-eligible cases on a case-by-case basis. Perhaps prosecutors could be required to notify the Attorney General of their intent before seeking an indictment and after a conviction for capital murder. The review of prosecutor decisions by the Attorney General is within the supervisory powers of his office.[168] Although prosecutors are constitutionally appointed officers and separation of powers issues remain, the power of the county prosecutor should not go unchecked.

V. CONCLUSION

The post-*Gregg* death penalty laws, like the one adopted in New Jersey, have allowed prosecutors to exercise virtually unbridled discretion in capital murder cases. Without standards to base their decisions and without a higher authority to hold them accountable, county prosecutors continue to apply the capital murder laws of New Jersey in a freakish and arbitrary manner. Special Master Baime's study has confirmed that the capital murder laws in New Jersey operate very much like being struck by lightning.[169]

The solutions to county variance go beyond mere statistical formulas and data comparison. A major overhaul of capital punishment law in New Jersey is required at all levels of government. This process must begin, however, with a comprehensive study of prosecutorial behavior and decision-making. The data yielded by such an inquiry will permit lawmakers to identify what new substantive limits are needed to successfully reduce the amount of prosecutorial discretion in capital cases. Only once we begin to fully

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[167] *See id.* at A-1.

[168] *See* N.J. STAT. ANN. § 57:17B-98 (West 1995), *reprinted in* BAIME III, *supra* note 7, at 51.

[169] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

understand the flaws in the system, can we balance the scales of justice and provide equality for all.[170]

Joseph R. McCarthy

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